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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re **Sun Up International Corp.**

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Serial No. 75/478,836

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**Thomas I. Rozsa of Rozsa & Chen LLP for Sun Up  
International Corp.**

**Henry S. Zak**, Trademark Examining Attorney, Law Office 108  
(David Shallant, Managing Attorney).

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Before Cissel, Seeherman and Bottorff, Administrative  
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Sun Up International Corp. has applied to register  
CRYSTAL and design, as shown below, for women's and  
children's shoes.<sup>1</sup>

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<sup>1</sup> Application Serial No. 75/478,836, filed May 4, 1998,  
asserting first use and first use in commerce as early as  
June 15, 1983.

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the following marks, three of which were originally registered by David Crystal, Inc. and are now owned by Crystal Brands, Inc., and the fourth of which is registered to The Krystal Company, as to be likely to cause confusion or mistake or to deceive.<sup>2</sup> The Crystal Brands marks are:

CRYSTAL for ladies' and misses' dresses, coats, suits, blouses, skirts, and sweaters;<sup>3</sup>

CRYSTAL KNITS, with the word "knits" disclaimed, for dresses, and suits;<sup>4</sup>

with the word "cotton" disclaimed, for ladies' and misses' dresses and dress ensembles, consisting of a dress and a coat, suits, coats, slacks, playsuits, blouses, work suits.<sup>5</sup>

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<sup>2</sup> Registration No. 1,086,494 for CRYSTAL COLLECTIONS, and also registered by David Crystal, Inc., was originally cited against applicant's applications. However, in his appeal brief the Examining Attorney stated that this registration has expired, and therefore it no longer forms a basis for refusal of registration.

<sup>3</sup> Registration No. 841,287, issued December 26, 1967; Section 8 affidavit accepted; Section 15 affidavit received; renewed in 1987 for a 20-year period.

<sup>4</sup> Registration No. 764,347, issued February 4, 1964; Section 8 affidavit accepted; Section 15 affidavit received; renewed in 1984 for a 20-year period.

<sup>5</sup> Registration No. 404,730, issued December 21, 1943; Section 8 affidavit accepted; Section 15 affidavit received; second renewal in 1983 for a 20-year period.

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The cited registration owned by The Krystal Company is for KRYSTAL for "clothing, namely, T-shirts, golf shirts, polo shirts, hats, visors, shorts, sweaters, sweatshirts, sweatpants, jackets, wind breakers, and aprons."<sup>6</sup>

Applicant has appealed from the refusals. The appeal has been fully briefed, but an oral hearing was not requested.

We affirm the refusals with respect to all of the cited marks.

Our determination is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to the refusals based on the Crystal Brands registrations for CRYSTAL, CRYSTAL KNITS and A CRYSTAL COTTON. In comparing marks, it is well established that there is nothing improper in stating that, for rational reasons more or less weight has been given to a particular feature of a mark, provided the ultimate

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<sup>6</sup> Registration No. 2,033,261, issued January 28, 1997.

conclusion rests on a consideration of the marks in their entireties. **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). In this case, we find CRYSTAL to be the dominant element of applicant's CRYSTAL and design mark. As the only portion of the mark which can be articulated, and therefore the portion by which purchasers would refer to the goods, it is likely to make a greater impression on purchasers that the ornamental flower design, and would be the portion that would be remembered and relied upon to identify the goods. See **In re Appetito Provisions Co.**, 3 USPQ2d 1553 (TTAB 1987). CRYSTAL is also the dominant portion of the registrant's marks CRYSTAL KNITS and A CRYSTAL COTTON. The disclaimed words KNITS and COTTON are merely descriptive of the material from which the clothing is made, and thus consumers would regard the word CRYSTAL as the source-identifying element in each mark.

Comparing the marks in their entireties, and giving appropriate weight to the dominant elements of each, we find that applicant's mark and the registered marks are similar in appearance, pronunciation and meaning. In particular, applicant's mark is identical in pronunciation and connotation to the registered mark CRYSTAL, and is very similar in appearance, the only difference being the

inclusion of the flower design in applicant's mark, a design which, for the reasons given above, has been given less weight in our analysis. Applicant's mark is also similar to the other two cited CRYSTAL registrations, for CRYSTAL KNITS and A CRYSTAL COTTON. The source-identifying portions of these marks--the word CRYSTAL--are the same as the dominant element CRYSTAL in applicant's mark, and the slight differences in appearance, pronunciation and connotation of the marks occasioned by the additional elements in applicant's mark and the registered marks are not sufficient to distinguish them. The commercial impression of all the marks is the same, and consumers will perceive the slight variations, e.g., the word KNITS and the word COTTON, as merely referring to the material of which the clothing items are made, rather than to an indication of a source separate from that of applicant's CRYSTAL and flower design mark.

With respect to the goods, the cited marks are registered for various clothing items, all of which include ladies' and misses' dresses and suits. As applicant points out, these goods are specifically different from the women's and children's shoes which are identified in its application. However, there is no requirement that the goods of the parties be similar or competitive, or even

that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. **In re International Telephone & Telegraph Corp.**, 197 USPQ 910, 911 (TTAB 1986).

In this case, applicant's identified women's shoes<sup>7</sup> would be purchased by the same class of consumers who purchase registrant's identified ladies' and misses' dresses and suits. Moreover, both applicant's and registrant's goods must be considered complementary products, since women generally try to match their shoes to their dresses or suits to create an overall outfit or look. As a result, consumers might well purchase both applicant's and the registrant's products during a single shopping trip, with the express purpose of having shoes and a dress or suit that go together. See **B. Rich's Sons, Inc. v.**

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<sup>7</sup> In its brief applicant states that its shoes are primarily for children. However, its identification of goods includes women's shoes, and we must determine the issue of likelihood of confusion based on the goods as they are identified in the application.

**Frieda Originals, Inc.**, 176 USPQ 284, 285 (TTAB 1972) ["shoes and women's wearing apparel are closely related goods which could be purchased in the same retail outlets by the same classes of purchasers and often during the same shopping excursion to complete an ensemble"]. See also, **In re Melville Corp.**, 18 USPQ2d 1387 (TTAB 1991).

In addition, the Examining Attorney has made of record a number of third-party registrations which show that various entities have registered their marks both for goods of the type listed in applicant's application and for goods of the type recited in registrant's registrations. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See **In re Albert Trostel & Sons Co.**, 29 USPQ2d 1783 (TTAB 1993).

For the foregoing reasons, we find that applicant's identified women's shoes and the registrant's identified women's and misses' dresses and suits are similar goods, and would be used for a complementary purpose, namely, to create an ensemble.

Applicant argues that the trade channels for its goods and those of the registrant are different, asserting that its goods are sold in shoe stores or in a separate section

of a department store from that in which the registrant's apparel would be sold. Even if we accept applicant's contention regarding trade channels, because women will frequently want to match their shoes to their outfits, and they may well visit both the dress department and the shoe department of a department store, or a dress store and a shoe store, when shopping for an ensemble or outfit.

Applicant also asserts that its goods and those of the registrant are sold "to totally different types of consumers." Brief, p. 5. Applicant has not submitted any evidence in support of this statement, and it is contradicted by the very identifications of goods, i.e., applicant's goods include "women's shoes" and the registrant's goods are identified as "ladies and misses," such nomenclature indicating women's dress sizes. Accordingly, we must deem applicant's and the registrant's goods to be sold to the same types of consumers, namely, women who are members of the general public.

With respect to the duPont factor of "the nature and extent of any actual confusion," applicant notes that it has used its mark since 1983, while the cited registrations claim use, and were registered, prior to that date. Applicant points to the lack of evidence of actual confusion during this 17-year period in support of its

claim that confusion is not likely. However, we have no information from the registrant as to its experiences with regard to any actual confusion, nor do we have any evidence about the registrant's activities, or even the nature and extent of applicant's sales and advertising, from which we can conclude that there has been an opportunity for confusion to occur if that were likely. See **In re Kangaroos U.S.A.**, 223 USPQ 1025 (TTAB 1984). In particular, we note that at page 9 of its brief applicant states that its goods are "shoes primarily for children." If, indeed, applicant uses its mark primarily on children's shoes, that may explain why it has not experienced any confusion between such goods and the registrant's clothing. However, because applicant is seeking to register its mark for women's as well as children's shoes, we must consider the question of likelihood of confusion with respect to all the goods identified in the application. Thus, although this factor does not weigh in favor of a finding of likelihood of confusion, neither can we say that it weighs in favor of not finding likelihood of confusion.

Finally, applicant points to the fact that The Krystal Company was able to register KRYSTAL for various items of apparel (the other registration which has been cited against applicant's application) despite the existence of

the various Crystal Brands' registrations on the Register. Applicant argues that it would be unfair to allow KRYSTAL to be registered, when it is for more similar goods to the cited CRYSTAL registrations, and to find likelihood of confusion between applicant's marks and these same registrations. We frankly acknowledge that we do not know why KRYSTAL was registered despite the existence of Crystal Brands' various CRYSTAL marks. Because the file of that application is not of record, we cannot determine whether Crystal Brands consented to the registration, or whether there were any other factors that persuaded the Examining Attorney that confusion was not likely. Whatever the reason, and even if the Examining Attorney committed an error in allowing the registration, the question before us at this point is whether applicant's mark is likely to cause confusion with the various Crystal Brands marks, and for the reasons we have already discussed, we find that such confusion is likely.<sup>8</sup>

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<sup>8</sup> To the extent that the KRYSTAL registration relates to the duPont factor of "the number and nature of similar marks in use on similar goods," the existence of this single registration is not sufficient to persuade us that the scope of protection for the Crystal Brands registrations is so limited that it does not extend to applicant's use of the very similar mark CRYSTAL and design for shoes. Although the coexistence of the CRYSTAL and KRYSTAL registrations favors applicant in the likelihood of confusion analysis, it is far outweighed by the other duPont factors, all of which militate in favor of a finding of likelihood of confusion.

We should also add that the various cases applicant has cited in support of its position are distinguishable on their facts, and therefore not persuasive of a different result in this case. In particular, **In re British Bulldog Ltd.**, 224 USPQ 854 (TTAB 1984) involved marks which, although identical in appearance and pronunciation, had different connotations because of the respective goods on which they were used; further, the goods themselves were found not to be related. Similarly, **Faultless Starch Co. v. Sales Producers Assoc. Inc.**, 530 F.2d 1400, 189 USPQ 141 (CCPA 1976) involved goods which were very different from each other (canned foods and laundry starch), as compared with the goods at issue here.

Accordingly, we affirm the refusal of registration with respect to Crystal Brands' registrations Nos. 841,287; 764,347 and 404,730.

We turn next to a determination of whether applicant's mark, CRYSTAL and design, used in connection with women's and children's shoes, is likely to cause confusion with the mark KRYSTAL, registered for "clothing, namely, T-shirts, golf shirts, polo shirts, hats, visors, shorts, sweaters, sweatshirts, sweatpants, jackets, wind breakers, and aprons."

Considering first the marks, for the reasons stated above, we find that CRYSTAL is the dominant element of applicant's mark. Applicant's and registrant's marks are obviously identical in pronunciation and connotation; in addition, we find them to be similar in appearance. The single difference in the words is the initial letter, in which the cited mark is misspelled with a "K". However, consumers are not likely to note or remember this slight difference in spelling. Under actual marketing conditions consumers do not have the luxury to make side-by-side comparisons between marks, and instead must rely on hazy past recollections. **Dassler KG v. Roller Derby Skate Corporation**, 206 USPQ 255 (TTAB 1980). Nor does the presence of the flower design in applicant's mark serve to distinguish the marks. To the extent that consumers will even note the presence or absence of this design, they will consider the CRYSTAL and design mark to be a variant of the cited mark. Thus, when the marks are considered in their entirety, they convey the same commercial impression.

With respect to the goods, although there is not the same complementary nature between applicant's goods and those listed in the KRYSTAL registration as there is between applicant's goods and those in the Crystal Brands registrations, the Examining Attorney has made of record

several third-party registrations which show that goods of the same type as applicant's and of this registrant's can emanate from a single source, and be sold under the same mark. For example, A and design is registered for, inter alia, shoes, jackets, sweat shirts and sweatpants, sweaters, shorts and T-shirts<sup>9</sup>; LILIUM is registered for, inter alia, jackets, sweaters, t-shirts, hats and shoes<sup>10</sup>; LITTLE IMPRESSIONS and design is registered for, inter alia, shoes and T-shirts<sup>11</sup>; and LITTLE BRAT is registered for, inter alia, children's clothing, namely, shorts, T-shirts, sweat shirts, sweat pants, jackets and shoes.

As for the channels of trade, even if we assume that applicant's women's and children's shoes would be sold in different retail stores or in different departments of retail department stores than the registrant's clothing items, they are all generally items of apparel which would be purchased by the same classes of consumers and for similar purposes, since people buy shoes as well as clothing to cover and adorn themselves.

Thus, we find that the Examining Attorney has demonstrated a sufficient relationship between applicant's

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<sup>9</sup> Registration No. 2,282,056.

<sup>10</sup> Registration No. 2,279,350.

<sup>11</sup> Registration No. 1,978,947.

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and the registrant's goods that, if sold under similar marks, confusion would result.

Applicant has not specifically made the argument with respect to this cited registration, as it has with the Crystal Brands' registrations, that there have been 17 years of concurrent use without any evidence of actual confusion. To the extent that applicant's comments in its brief were meant to apply to The Krystal Company's registration also, we reiterate our comments that we have no information about the experience of the registrant regarding any actual confusion it might have experienced, nor do we have any information about the geographic area or extent to which applicant's and the registrant's goods bearing their respective marks have been sold or advertised. Thus, we cannot deem this factor to weigh in applicant's favor.

A duPont factor which does weigh in applicant's favor is the co-existence on the Register of both the Crystal Brands and The Krystal Corporations' registrations for very similar marks for very similar goods, goods which are more similar to each other than are applicant's to either registrant's. However, as we stated previously, we do not know the reason that The Krystal Corporation's mark was approved for publication and subsequently registered. And,

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as we also stated, this factor favoring a finding of no likelihood of confusion is not sufficient, in view of the other factors which favor a finding of likelihood of confusion, to warrant reversing the refusal of registration.

Decision: The refusals of registration based on Registrations Nos. 841,287; 764,347; 404,730 and 2,033,261 are affirmed.

R. F. Cissel

E. J. Seeherman

C. M. Bottorff  
Administrative Trademark Judges  
Trademark Trial and Appeal Board